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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

FACEBOOK, INC. and MARK ZUCKERBERG,

Plaintiffs,

v.

CONNECTU LLC (now known as CONNECTU INC.) ET AL.,

Defendants.

CASE NO. C 07-01389 RS

DEFENDANTS' OBJECTIONS TO THE EXHIBITS TO THE DECLARATION OF MONTE COOPER IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Date: February 27, 2008
Time: 9:30 a.m.
Judge: Honorable Richard Seeborg

Much of the evidence which Plaintiffs use to support their Motion for Partial Summary Judgment is inadmissible under the Federal Rules of Evidence. This Court cannot and should not consider this evidence in ruling on this Motion. Evidence submitted in support of a motion for summary judgment is subject to the same rules of admissibility as if the evidence were submitted at trial. *Beyene v. Coleman Sec. Servs., Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988) ("It is well settled that only admissible evidence may be considered by the trial court in ruling on a motion for summary judgment."). This rule requires that any evidence submitted in support of a motion for summary judgment must, for example, be properly authenticated and must not be inadmissible hearsay. *Id.* at 1182; *Canada v. Blain's Helicopters, Inc.*, 831 F.2d 920, 925 (9th Cir. 1987)

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("[D]ocuments which have not had a proper foundation laid to authenticate them cannot support a motion for summary judgment.").

Plaintiffs routinely rely on evidence that lacks foundation, is hearsay, has not been properly authenticated, and/or is otherwise inadmissible. *None* of the emails or instant message conversations relied upon by Plaintiffs have been properly authenticated pursuant to Fed. R. Evid. 901(a), which requires that a document's proponent proffer "evidence sufficient to support a finding that the matter in question is what its proponent claims." Plaintiffs have not offered any authentication that these emails resulted from production pursuant to document requests. Nor have Plaintiffs shown that the emails upon which they rely were generated/received from the individuals whom they assert were the writers/recipients. One prominent commentator has written that "[b]ecause of the potential for unauthorized transmission of e-mail messages, authentication requires testimony from a person with personal knowledge of the transmission or receipt to ensure its trustworthiness." 5 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 900.07[3][c] (2d Ed. 2007). Plaintiffs' counsel's declaration that the exhibits are "true and correct copies" is not sufficient to authenticate them. *See Orr v. Bank of Am.*, 285 F.3d 764, 776-77 (9th Cir. 2002).[1]

To the extent any emails are properly authenticated, they are inadmissible hearsay under Fed. R. Evid. 802.

Notable examples of Plaintiffs attempts to use inadmissible evidence in support of their Motion include:

The only emails that Plaintiffs even purport to authenticate in their Motion are emails sent by employees of iMarc. (*See* Exs. 22-27, 29 to Cooper Decl., cited in Mot. at 5, 17, 18, 20.) Not only was Plaintiffs' attempt at authentication inadequate, these emails are clear hearsay and Plaintiffs have not laid any foundation that Defendants were even aware of these communications.

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[1] Furthermore, two emails from third parties contained in Exhibits 29 and 45 are not even identified as true and correct copies, yet Plaintiffs directly quote hearsay statements from them in their Motion. At pages 22-23 of the Motion, Plaintiffs quote from an email from "Glen C. Hill" included in Exhibit 29, though Mr. Cooper only attests that the exchange of "Emails between Marc Pierrat and Cameron Winklevoss" is a "true and correct copy." Similarly, at page 11 of the Motion, Plaintiffs quote from an email from "David M. Shirley" included in Exhibit 45, though Mr. Cooper only attests that the exchange of "Emails between Cameron Winklevoss, Wayne Chang, David Gucwa" is a "true and correct copy."

Plaintiffs extensively cite Exhibit 9 to the Cooper Declaration, "Instant Messaging between David Gucwa and various individuals in 2005." (Mot. at 3, 6, 8, 9, 10, 11, 12, 13, 14, 17, 18, 19, 20.) However, Mr. Gucwa has not been deposed and plaintiffs have entirely failed to authenticate and lay a foundation for the reliability of these documents. In *United States v. Tank*, 200 F.3d 627, 630-31 (9th Cir. 2000), the government succeeded in authenticating print outs of the defendant's online chat conversations through the testimony of the producer of the print outs of the chats, who explained how he created the logs with his computer and stated that the printouts appeared to be accurate representations; the government established the connection between defendant and the chat room log printouts by showing the defendant habitually used the screen name in question. Plaintiffs have offered no such evidence here. *See also United States v. Gagliardi,* 506 F.3d 140, 151 (2nd Cir. 2007) (in criminal case, relying on informant and investigating agent's testimony that instant message chats involved defendant to find they were properly authenticated).

Plaintiffs cite several similar emails from nonparties which they claim show "misleading" emails sent by ConnectU. (*See* Exs. 40, 43, 63, 64 to the Cooper Decl., cited in Mot. at 10.) These emails lack foundation, have not been properly authenticated, and contain hearsay.

Finally, Plaintiffs cite Exhibit 41 to the Cooper Declaration, which is many pages of what appears to be computer code. (Mot. at 9, 13, 20, 21.) These documents are hearsay and lack foundation. There is no testimony that would tie this or any code produced to code that was used in the ConnectU site. Further, Plaintiffs' conclusions as to the effect of this script are unsupported and lack foundation.

Defendants' objections to all inadmissible evidence offered by Plaintiffs are set out in the following chart:

(Exhibits Marked With "*" Were Filed Under Seal)

EXHIBIT # BATES RANGE	DESCRIPTION	OBJECTIONS	PAGE CITES
Ex. 6* C003990-91	Emails between C. Winklevoss and M. Pierrat Re: registration,	Hearsay; lacks foundation. Plaintiffs	3, 19

EXHIBIT # BATES RANGE	DESCRIPTION	OBJECTIONS	PAGE CITES
	May 4, 2004	fail to authenticate this document.	
Ex. 9* GUCWA 0003, 0009, 0022-25, 0032-33, 0048-49, 0056-60, 0071, 0073-78, 0097-99, 0124, 0128, 0130, 0134, 0142, 0152-53	Instant Messaging between David Gucwa and various individuals in 2005	Hearsay; lacks foundation. Plaintiffs fail to authenticate this document.	3, 6, 8, 9, 10, 11, 12, 13, 14, 17, 18, 19, 20
Ex. 20* C003865-69	Emails between Cameron and Howard Winklevoss Re: Social Networks, May 3, 2004	Hearsay; lacks foundation. Plaintiffs fail to authenticate this document.	4
Ex. 22 iMarc000798	Email from Mark Pierrat to Fred LeBlanc, Dave Tufts, and Nick Grant Re: mining the facebook, June 11, 2004	Hearsay; lacks foundation. Plaintiffs fail to authenticate this document.	5, 18
Ex. 23 iMarc000802	Email from Mark Pierrat to Fred LeBlanc, Dave Tufts, and Nick Grant Re: mining the facebook, June 11, 2004	Hearsay; lacks foundation. Plaintiffs fail to authenticate this document.	5, 18
Ex. 24 iMarc000800	Email from Nick Grant to Mark Pierrat, Fred LeBlanc, and Dave Tufts Re: mining the facebook, June 11, 2004	Hearsay; lacks foundation. Plaintiffs fail to authenticate this document.	5, 18
Ex. 25 iMarc000659	Email from seluraved@gmail.com to Dave Tufts Re: [iMarc] Personal Mail, July 6, 2004	Hearsay; lacks foundation. Plaintiffs fail to authenticate this document.	5, 17, 18
Ex. 26 iMarc000629-31	Email between Marc Pierrat, Dave Tufts, Nick Grant, and Jennifer Starr Re: Jennifer Starr wants you to join ConnectU, July 22, 2004	Hearsay; lacks foundation. Plaintiffs fail to authenticate this document.	5, 18, 20
Ex. 27 iMarc000474	Emails between David Gomel, Dave Tufts, and Nils Menten Re: [iMarc] WWW Mail, September 14, 2004	Hearsay; lacks foundation. Plaintiffs fail to authenticate this document.	5, 18

EXHIBIT # BATES RANGE	DESCRIPTION	OBJECTIONS	PAGE CITES
Ex. 29* C007512-17	Emails from Marc Pierrat to Cameron Winklevoss Re: Unsolicited commercial email sent to Northeastern University, August 26, 2004	Hearsay; lacks foundation. Plaintiffs fail to authenticate this document.	5, 22, 23
Ex. 32* PNS01766-77	Pacific Northwest Software, "Time by Job Detail," September 1, 2003-February 6, 2007	Hearsay; lacks foundation. Plaintiffs fail to authenticate this document.	6, 9, 12, 18, 19, 20
Ex. 33* C011073-82	i2hub.com Billing Details for Time & Expenses for David Gucwa, January 13, 2005 - March 30, 2005 (Same as Ex. 55)	Hearsay; lacks foundation. Plaintiffs fail to authenticate this document.	6, 20
Ex. 34* PNS000015-16	Email from Wayne Change to John Taves Re: bullets, May 25, 2005	Hearsay; lacks foundation. Plaintiffs fail to authenticate this document.	6, 11, 18, 20, 23
Ex. 36* PNS02096	ConnectU Profiler Importer - Social Butterfly diagram	Hearsay; lacks foundation. Plaintiffs fail to authenticate this document.	6, 7, 8, 9, 17, 19, 20
Ex. 37* C011010	Front Page of Social Butterfly website	Hearsay; lacks foundation. Plaintiffs fail to authenticate this document.	8
Ex. 38* C000027-28	Privacy Statement for www.ConnectU.com	Hearsay; lacks foundation. Plaintiffs fail to authenticate this document.	8
Ex. 40* C004512	Email from jsteven3@nd.edu to Mark Ruocco Re: Mark Rucco invites you to join ConnectU, April 21, 2005	Hearsay; lacks foundation. Plaintiffs fail to authenticate this document.	8, 10, 22
Ex. 41* PNS001377-86, PNS0281451-54, PNS0281495 PNS0281504-14, PNS0281520, PNS0281522-26, PNS0296805-06,	Computer Code	Hearsay, lacks foundation and is unauthenticated. Specifically, regarding certain pages of what appears to be computer script that are	9, 13, 14, 20, 21

EXHIBIT # BATES RANGE	DESCRIPTION	OBJECTIONS	PAGE CITES
PNS0320945		unauthenticated and lack foundation. There is no evidence this script was run. Plaintiffs' conclusions as to the effect of this script are unsupported and lack foundation.	
Ex. 42* CUCA02972	Email from Winston Williams to Cameron & Tyler Winklevoss, Joel Voss, and John Taves Re: ConnectU Stats, May 10, 2005	Hearsay; lacks foundation. Plaintiffs fail to authenticate this document.	9, 19, 21
Ex. 43* CUCA000172	Emails between Hanah Kim and Thomas Cheng Re: Thomas Cheng invites you to join ConnectU, April 21-22, 2005	Hearsay; lacks foundation. Plaintiffs fail to authenticate this document.	9, 10, 22
Ex. 45* PNS000842-43	Emails from Cameron Winklevoss to Wayne Chang, David Gucwa, John Taves, Winston Williams and Joel Voss Re: importer.i2hub.com, February 17, 2005	Hearsay; lacks foundation. Plaintiffs fail to authenticate this document.	11, 12, 13, 16, 18, 21, 23
Ex. 46* PNS001238-39	Email from Tyler Winklevoss to Tyler and Cameron Winklevoss, Winston Williams, Joel Voss and John Taves Re: Update, February 18, 2005	Hearsay; lacks foundation. Plaintiffs fail to authenticate this document.	12, 18, 21
Ex. 47* C004243	Email from Cameron Winklevoss to mrprimate@pnwsoft.com, Wayne Change, and David Gucwa, February 22, 2005	Hearsay; lacks foundation. Plaintiffs fail to authenticate this document.	12, 18
Ex. 48* PNS001334-40	Email from Wayne Chang to John Taves forwards Instant Messaging between Tyler Winklevoss and Wayne Chang Re: Social Butterfly and i2hub.com, May 25, 2005	Hearsay; lacks foundation. Plaintiffs fail to authenticate this document.	13
Ex. 49 C006186-96	Article entitled Business, Casual, by Kevin J. Feeney, published in The Harvard Crimson, February 24, 2005	Hearsay; lacks foundation. Plaintiffs fail to authenticate this document.	16
Ex. 51* C008392	Emails between John Taves, Wayne Chang, and Cameron Winklevoss Re: DB and	Hearsay; lacks foundation. Plaintiffs fail to authenticate	19

EXHIBIT # BATES RANGE	DESCRIPTION	OBJECTIONS	PAGE CITES
	importer, February 16, 2005	this document.	
Ex. 52* C008657	Email from Wayne Chang to Winston Williams, Cameron & Tyler Winklevoss, and David Gucwa Re: crawler, February 20, 2005	Hearsay; lacks foundation. Plaintiffs fail to authenticate this document.	19
Ex. 53* C008662	Email from Wayne Chang to David Gucwa, Cameron Winklevoss and Winston Williams Re: crawler, February 19, 2005	Hearsay; lacks foundation. Plaintiffs fail to authenticate this document.	19
Ex. 54* C010359	Email from Cameron Winklevoss to Wayne Chang, Winston Williams, and David Gucwa re: importer down, February 19, 2005	Hearsay; lacks foundation. Plaintiffs fail to authenticate this document.	19
Ex. 55* C009887-96	i2hub.com Billing Details for Time & Expenses for David Gucwa, January 13, 2005 - March 30, 2005 (Same as Ex. 33)	Hearsay; lacks foundation. Plaintiffs fail to authenticate this document.	20
Ex. 58* C008389-91	Emails between Winston Williams and John Taves re: DB and Importer, February 16, 2005	Hearsay; lacks foundation. Plaintiffs fail to authenticate this document.	21
Ex. 59* C006537	Email from Cameron Winklevoss to drtol@gmail.com, mrprimate@pnwsoft.com, tyler@winklevoss.com, jvoss@pnwsoft.com and john.taves@pnwsoft.com Re: update	Hearsay; lacks foundation. Plaintiffs fail to authenticate this document.	21
Ex. 61* CUCA02976-77	Email from Winston Williams to Cameron Winklevoss Re: ConnectU Website Contact Form: 02/05/2006	Hearsay; lacks foundation. Plaintiffs fail to authenticate this document.	21
Ex. 63* CUCA000208	Email from Danny Abed to vroenteno@ucdavis.edu Re: Danny Abed invites you to join ConnectU, April 20, 2005	Hearsay; lacks foundation. Plaintiffs fail to authenticate this document.	9, 10
Ex. 64* CUCA000210	Email from JoJo Lagace to alchou@ucdds.edu Re: JoJo Lagace invites you to join ConnectU, April 20, 2005	Hearsay; lacks foundation. Plaintiffs fail to authenticate this document.	9, 10

Dated: February 6, 2008

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